Supreme Court, U.S.
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No. 97-889

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

CEASAR WRIGHT

Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORP.;
STEVENS SHIPPING & TERMINAL COMPANY;
STEVEDORING SERVICES OF AMERICA;
RYAN-WALSH, INC.;
STRACHAN SHIPPING COMPANY;
CERES MARINE TERMINALS, INC.; and
SOUTH CAROLINA STEVEDORES ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

PETITIONER'S REPLY BRIEF

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Respondents Provide No Basis To Deny The Writ

The Respondents' "Reasons for Denying the Writ" are wholly insubstantial.[1] The first reason appears to be an assertion that there is no conflict between the circuits (page 7). But the Brief concedes on pages 9-10 that there is a clear conflict between the rationale of *Austin v. Owens-Brockway Glass Container Co.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S.Ct. 432 (1996), and the rationale followed by all other circuit courts of appeal. Indeed, since Petitioner filed his initial Petition in this Court, the Third Circuit, in *Martin v. Dana Corp.*, 156 L.R.R.M. 3137 (3d Cir. 1997) (not officially reported), has joined the five circuits that had previously refused to follow *Austin* as to employment discrimination claims of workers represented by unions. Contrary to Respondents' assertion (page 10), several courts of appeals have published reasoned opinions that have adhered to *Alexander v. Gardner-Denver Corp.*, 415 U.S. 36 (1974), and have rejected *Austin*. *Austin* rests solely on a strained interpretation of statutory language that "where appropriate and

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[1] The Respondent's Statement of Facts implies that Petitioner's conduct was somehow inconsistent. In fact, in May, 1994, Petitioner's physician thought he would be permanently disabled, but petitioner's condition later unexpectedly improved, as demonstrated by x-rays taken in January, 1995. (Petition at 4) Petitioner returned to full-duty work without incident for ten days before the Employers decided to reject him. In a classic stereotypical response that the Americans with Disabilities Act was intended to prevent, the Employers then stated that "Once an individual is certified as permanently and totally disabled, he is no longer qualified to perform longshore work of any kind," without requesting an independent medical exam or other documentation.

to the extent authorized by law, ... arbitration ... is encouraged to resolve disputes." Judge Posner accurately observed in *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir.), *cert. denied*, 118 S.Ct. 294 (1997), that "These provisions [were] a polite bow to the popularity of 'alternative dispute resolution,'" but Judge Posner noted this language was not intended to establish mandatory arbitration under labor agreements. Legislative history cited in *Austin* makes clear that Congress endorsed voluntary arbitration, not mandatory arbitration. 78 F.3d at 881-82.

Judge Posner, writing in *Pryner*, and every other circuit to address the issue, have shared Petitioner's concern about the appropriateness of exclusive union control of the prosecution of statutory discrimination complaints, which Respondents regard as "anachronistic" (page 14). Since labor unions must constantly resolve contract grievances, the apparatus of labor arbitration is very different from the procedures utilized in commercial arbitration, including employment arbitration for the stock broker who sued in *Gilmer v. Interstate / Johnson Lane Corp.*, 500 U.S. 20 (1991).

Throughout the grievance appeal process (sometimes even in arbitration), unions typically provide lay staff members to present the grievance. Unions not only do not provide attorneys, they invariably do not allow the worker's personal attorney to participate, because it is the union's grievance. Many labor grievance procedures (including the appeal process for the union here) provide that grievances will be resolved by a binding award from a labor-management panel, unless the panel deadlocks. Such panels are well versed in the practices

of the industry ("the law of the shop"), but they are untrained and inexperienced in resolving statutory claims ("the law of the land"). See *Alexander*, 415 U.S. at 57.

Therefore, this Court's concern in *Alexander* about the inferiority of the extremely informal procedures of labor grievances and arbitration to resolve complex matters arising under employment discrimination statutes continues to be valid today. Since *Alexander*, commercial arbitration has grown increasingly sophisticated. Businesses seeking to arbitrate complex commercial disputes, or individual employees arbitrating under *Gilmer* agreements, can select their own attorneys, can select an arbitrator trained in the law, can provide for a transcribed record of proceedings, and can request detailed written findings to discipline the arbitrator to follow the relevant law in resolving a statutory claim. In usual practice, none of these procedures is available in labor grievances today, any more than in 1974. 415 U.S. at 57-58.

Labor grievance and arbitration is primarily used to resolve a constant stream of relatively routine contract disputes. As this Court observed in *Alexander*, to raise the practice in the arbitral forum to "a standard that adequately insured effectuation of Title VII rights ... would tend to make arbitration a procedurally complex, expensive and time-consuming process." 415 U.S. at 59. In *Alexander*, this Court continued, "And judicial enforcement of ... a standard [that adequately insured effectuation of Title VII rights] would almost require courts to make de novo determinations of the employees' claims." *Idem.* This Court's observations about labor arbitration in 1974 remain equally valid today.

CONCLUSION

The decision below now conflicts, directly or in principle, with the decisions of eight other circuits, as well as with this Court's decisions in *Alexander* and *Gilmer*. The conflict will not go away. The Fourth Circuit has expressed its determination to adhere to *Austin*, in enforcing "general" arbitration clauses like the one in this case, until this Court corrects it. As shown by the insubstantial response in the Respondents' Brief in Opposition, there are no good reasons to change the rule that this Court has articulated in *Alexander* and its progeny. This Court should grant the writ and set this matter for briefing and argument, unless the Court finds the opposition so insubstantial that summary reversal on the Petition is deemed more appropriate.

Respectfully submitted,

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